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**Issue Date: 08 July 2005**

Case No.: **2004-LHC-02714**

OWCP No.: **06-188335**

In the Matter of:

**DAVID L. BROWDER,**
Claimant,

v.

**ROSS MARINE /**
**AMERICAN INTERSTATE INSURANCE CO.**
Employer/Carrier,

and

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM,**
Party In Interest

## DECISION & ORDER GRANTING BENEFITS

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq.

A formal hearing was held in Charleston, South Carolina, on January 27, 2005, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

## I. PRELIMINARY MATTERS[1]

At the hearing, the parties entered joint stipulations into evidence. Tr. 5. Claimant entered CX 1 – 28 into the record. Tr. 6. Employer's exhibits 1 – 23 were also entered into the record. Tr. 7.

## II. STIPULATIONS

The parties have stipulated to and I so find the following facts:

1. That all physician's depositions and documentary exhibits taken or submitted in the South Carolina Workers Compensation case between the above referenced parties shall be admissible in the within action to the fullest extent of the applicable rules without further necessity of authentication.

2. That the Claimant's average weekly wage applicable to this case is $1,507.21 and that the Claimant's compensation rate is the maximum for the year 2000 of $901.28.

Tr. 5.

## III. ISSUES

1. Whether Claimant is able to fulfill the status requirement under the Act, thus availing himself of coverage under the Act.

2. Whether Claimant's action is barred by Res Judicata / Collateral Estoppel.

3. Whether Claimant's action is barred by the Statute of Limitations under § 913.

4. Whether Claimant complied with the notice requirement under § 912.

5. Whether Claimant sustained a compensable injury under the Act or suffered a non-work related accident that served as an independent intervening cause of his disability, if any.

6. Existence of disability.

7. Nature and Extent of Claimant's disability, if any.

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[1] *The following abbreviations will be used as citations to the record:*

*JS* - *Joint Stipulations;*
*TR* - *Transcript of the Hearing*
*CX* - *Claimant's Exhibits; and*
*EX* - *Employer's Exhibits.*

## IV. CONTENTIONS

*A. Claimant's Contentions*

Claimant argues that he is totally and permanently disabled due to the combined effects of the August 8, 2000, work-related injury and his pre-existing and continuing cardiac condition. He asserts entitlement to reimbursement for all medical expenses incurred to date and all future benefits specified under the Act.

Claimant further avers he is entitled to disability compensation at the maximum compensation rate of $901.28, beginning March 1, 2001, the date at which he was unable to continue his services as General Manager at Island Catamaran, and continuing.

*B. Employer's Contentions*

Employer, on the other hand, argues that Claimant did not suffer a compensable injury in August, 2000, but rather injured himself while playing golf in December, 2000. Employer furthermore defends this claim based on Claimant's lack of longshoreman status, failure to meet the requirements of Sections 912 and 913, and *res judicata* and collateral estoppel.

## V. SUMMARY OF THE EVIDENCE

While I have carefully read and considered all of the evidence submitted in this well-developed record, I have only summarized below the evidence that I found relevant in deciding this case.

*A. David Browder*

The Claimant, David Browder, testified at the hearing. Tr. 14. Claimant stated he had "been in the boat business" since 1975, and had done "pretty much everything" including "paint, fiberglass, installed engines, electronics, commissioned new boats, rigging of sailboats, rigging of sports fishing boats, motor yachts. I've also became a marine surveyor . . . work[ing] on behalf of underwriters in any type of marine claim [to] determine the extent of damage, cause of damage and oversee with the repair yards to make sure that the boats were repaired properly." Tr. 16.

Claimant testified that he began working for Ross Marine in 1993, as an in-house marine surveyor. Tr. 18. Claimant and Employer entered into an employment agreement which listed his specific job duties for Ross Marine. Tr. 70. On cross-examination, Claimant admitted that the duties enumerated in the agreement did not specifically include traditional longshore activities, such as repair or loading and unloading vessels. Tr. 71.

On some days, Claimant would "spend 30 to 40 percent of the day in the yard," on other days, he would spend that amount of time at the marina, looking at boats. Tr. 25. Claimant testified that it was common for management at Ross Marine to do physical work on the boats,

"We all wore different hats and worked as a team." Tr. 26. Claimant painted boats, did spot repairs on boats, installed electronics, and helped install engines. Tr. 26; 72.Claimant largely had discretion over what he did at work, "I did . . . what I thought was necessary to develop the yard, to run the yard, and [the company president] knew what I was doing." Tr. 73; see also Tr. 112 - 113.

On August 9, 2000, Claimant was in the shipyard inspecting the paint on the Sea Bee Spirit, a 72-foot boat. Tr. 27. Ross Marine's coating supervisor, Kenny Chaplin, had asked Claimant to look at the boat's paint because the boat's captain was not pleased with the color match. Id. The boat was "sitting along the fence line as close to the water" as possible. Id. Access onto the boat was by climbing a ladder onto the top deck – approximately fifteen feet off of the ground. Tr. 29. Claimant slipped off of the ladder, and held onto the stanchion, but eventually fell to the ground. Id. He had undergone open heart surgery in March 2000, and hanging onto the stanchion produced severe pain in his ribs, since they had not yet completely healed from the surgery. Id.

Claimant returned to his office after he fell and told Vicki Haught, the human resources manager at Ross, that "I had fallen and that my ribs hurt and I was going to go lay on my couch;" he also told Ms. Haught to "file a claim" for workmen's compensation. Tr. 31 – 32. After lying down, Claimant noticed that his back hurt as well as his ribs: "When I stood up the pain in my lower back was so intense I almost passed out." Tr. 31.

Because of the intensity and location of the pain, Claimant thought that he had a kidney stone. Tr. 32. Claimant's son and Arthur Swaggert, the president of Ross Marine, took Claimant to the emergency room. Tr. 33. Claimant did not have kidney stones; he was released from the hospital with pain medication and told to consult his family doctor. Tr. 34.

Claimant's family doctor, Bill Wilson, treated Claimant's back injury from August 11, 2000, through December, 2000. Tr. 36. Claimant was treated with muscle relaxants and pain medication. Id. In December, 2000, Claimant attempted to play golf. Tr. 45. Claimant testified, "I thought walking and stretching would probably do my back some good." Tr. 45. He had not attempted to play golf between August and December 2000. Id. After his second swing on the first tee, Claimant experienced back pain causing him to stop playing; he did ride in the cart for the remaining eight holes, so he could "hang out with the guys." Tr. 47.

Claimant testified that after playing golf he was still having the same kind of pain in the same areas that he had before playing golf. Tr. 48. He has not played golf since that time. Id. On cross-examination, Claimant testified that he had gone to the emergency room, his chiropractor and his family doctor between August and December 2000, but following the December golf game, Claimant saw Dr. Coon, Dr. Carbonoski, Dr. Wilson, and Dr. Ivester, all in a six day period. Tr. 85 – 86. Claimant does not believe that he aggravated his back injury by playing golf, stating that the pain was the same pain that he had been having since August, 2000, although it "may have gotten a little more intense." Tr. 91.

Claimant sought treatment from a chiropractor the Monday following his golf outing. Tr. 48. Claimant testified that he had been having pain in his back and neck continuously since the

August 2000 work-related accident, and had scheduled the appointment on December 18, 2000, prior to his golf game. Tr. 46. Claimant also had severe pain radiating down his left leg. Tr. 52. Claimant testified that he was in a lot of pain over Christmas of 2000 and had to stay in bed. Tr. 49. After Christmas, Claimant went back to his chiropractor, who referred him to Dr. Ivester, an anesthesiologist. Dr. Ivester gave Claimant an epidural. Id. After the second day of the epidural, Claimant was in extreme pain, and was referred to Dr. Carbonoski who treated his pain. Tr. 50 – 51. Dr. Carbonoski referred Claimant to Dr. Worthington. Tr. 51.

Dr. Worthington was the first one of Claimant's physicians to order an MRI. Tr. 51. Claimant stated that his understanding of Dr. Worthington's findings was that he had a ruptured or herniated disc and that there were fragments pinching a nerve in the "canal of the disc." Tr. 51. Claimant did not immediately have the surgery Dr. Worthington recommended because he wanted to get his new company, Island Catamaran, up and running.

Claimant did not "realize the extent" of his injuries in August 2000. Tr. 36. At the time, he only missed two or three days of work, but after that he worked "on a limited basis. If I felt good, I'd stay and work four or five hours. If I felt bad, I'd lay down on my couch and talk to customers on the telephone while I was laying on my couch." Tr. 37. Claimant testified that he was injured during a fairly busy time of year for the Employer. Tr. 37. About three weeks after the accident, Claimant was sent to New England to bid some projects for customers there. Tr. 38. After Claimant came back from New England, Mr. Swaggert, the president of the company told Claimant that "it was time for us to part company." Tr. 39. Claimant believes that he was terminated because of his back injury, but no one from the company ever indicated to Claimant that his injury was the reason for his termination. Tr. 92.

Following his termination, Claimant filed for payment of his medical treatment for his back pain with his private insurance carrier, since that was the only way he had to pay for medical treatment. Tr. 40, 86-90, 91. Claimant eventually underwent an MRI on his back in January, 2001. Tr. 41. At that time, Dr. Curtis Worthington diagnosed his back injury as the source of Claimant's ongoing pain. Tr. 41, 90.

Claimant also filed for unemployment after he was terminated from Ross Marine, since he believed he could still work. Tr. 42, 95. Employer did not dispute his unemployment claim. Tr. 42, 95. Claimant terminated his unemployment benefits in January, 2001, when he bought into a company called Island Catamaran. Tr. 43. The company was building a boat, and as general manager, Claimant's was responsible for "overseeing the day to day operations of building the boat." Tr. 43. Claimant quickly found that he could not "climb inside the boat and climb scaffolding and ladders." Tr. 43. The company had to hire a general manager by March, 2001, at which time Claimant's role changed: "I would answer the telephone. I'd order some materials. I would sit down and talk with them about any problems, but basically I laid up in an office on a couch most of the time." Tr. 44. Claimant stated that he did not receive any wages from Island Catamaran and in fact lost money on the business. Tr. 45.

Claimant had back surgery in April, 2001. Tr. 52. While Claimant testified that he felt better at first, he soon found that he couldn't use his left leg: "It was dragging. I had severe pain in my back, severe pain radiating in my leg." Tr. 52. Claimant believes that he became totally disabled

after the April 2, 2001 surgery. Tr. 96. Eventually, Claimant was referred to Dr. Dubic, under whose care he participated in a pain management program. Tr. 53. Claimant testified that he was taking "massive quantities" of narcotics for pain, and has a "possible" addiction problem with his pain medication. Tr. 53 – 54. Claimant had to have valium and morphine every night to sleep, but tried to avoid pain medication during the day. Tr. 54. Claimant also took an over the counter sleep aid, blood pressure medicine, and angina medicine. Tr. 54 – 55.

Also in April, 2001 Claimant's yacht won the Palmetto Cup in the Charleston Race, although Claimant did not recall racing the boat. Tr. 105, 115. Prior to his injury, Claimant testified that he and his family were avid sailboat racers. Tr. 19.

In April, 2002, Dr. Michael Tyler performed surgery on Claimant's back. Tr. 56. Claimant stated his condition was better after the operation. Id. "I was still taking pain medication, but not heavy narcotics. We went down to Darvocet and Lortab and that was it." Id. Claimant still has numbness in his left leg. Tr. 57.

Claimant testified that he can no longer attend boat shows, race boats, or pilot boats. Tr. 60 – 62. Claimant testified that he cannot work or generate income since his accident. Tr. 62 – 63. Claimant had attempted to attend car auctions in connection with his wife's business, but he could not walk around the auction floor without severe back pain or angina. Tr. 64. Claimant testified that he would "end up in bed for two days" due to the exhaustion he experienced from attending car auctions. Tr. 65. Claimant does go to the office of Premier Motor Cars, his wife's business, occasionally: "Basically, it's a place for me to go to get away from the house." Tr. 66.

Claimant testified that he has psychological problems as a result of the work-related accident. Tr. 57. Claimant now suffers from depression due to his inability to work and support his family, and his inability to participate in leisure activities with his family. Id.; Tr. 67.

Claimant developed cardiac problems during the years he worked for Ross Marine, and has undergone numerous treatments for his heart since 1995. Tr. 20 – 24. Claimant had a double bypass in March, 2000. Tr. 79. Although Claimant had stopped smoking for a while after his bypass surgery, Claimant now smokes about seven cigarettes a day, and cannot exercise. Tr. 79 – 81.

*B. Chris Clausen*

Mr. Clausen is a banker with Carolina First Bank, specializing in commercial real estate lending. Tr. 119. He is also a personal friend of the Claimant. Id. Mr. Clausen described Claimant's physical condition before the August 2000 accident as "very athletic" and "fine." Tr. 120. Claimant never complained of back pain to Mr. Clausen before August, 2000. Id. In December, 2000, Mr. Clausen was with Claimant when he attempted to play golf. Mr. Clausen stated, "David went and hit his second shot and he just – he said, guys, I'm – I'm just going to ride for awhile. He never did swing again. Actually, he got out of the golf car after nine holes and went home." Tr. 121.

Mr. Clausen was also on the Claimant's yacht when it won the Palmetto Cup in 2001. He testified that while Claimant was on the boat at the time, he was heavily medicated "to the point where it was pretty scary to race with him. He was on some pretty bad pain pills." Tr. 123.

*C. Kenneth Chaplin*

Kenny Chaplin is a former employee of Ross Marine Company. Tr. 125. He was a paint and fiberglass supervisor there. Mr. Chaplin had asked Claimant to come check the paint match on the Sea Bee Spirit in April, 2001. Tr. 127. Mr. Chaplin did not witness Claimant's injury. Id.

Mr. Chaplin testified that Claimant "was in the yard often . . . weekly sometimes. Sometimes it was a while before we'd see him. We could request him, he'd come down." Tr. 128. Claimant also physically helped with the paintwork. Tr. 128 – 129.

*D. Jean Hutchinson*

Jean Hutchinson is a vocational and rehabilitation counselor who testified as an expert in vocational counseling in this case. Tr. 132-33. Ms. Hutchinson evaluated Mr. Browder on July 14, 2003 and had two telephone, follow-up interviews with him December 8, 2004 and January 25, 2005. Tr. 134. After discussing the evidence that she reviewed to make her evaluation, Ms. Hutchinson testified,

> Prior to his back injury [Claimant] was able to function in his usual occupation despite his heart condition. Now with the back injury and as a result of that he's unable to return to his most recent work. He's unable to return to any past employment. He's unable to progress to his jobs of transferability. And considering the limitations we have on him given by his doctors he's unable to meet the exertional requirements for sedentary work, which is the lightest exertional level of work.
>
> He'd be unable to adjust to other types of work environments, unable to obtain or maintain employment, and therefore, is unemployable.

Tr. 137 – 38.

Ms. Hutchinson also testified that she did not consider Claimant's activities at Premier Motor Cars "employment" because Claimant does not have set hours or set job duties. Tr. 139. Furthermore, Ms. Hutchinson opined Claimant's occasional attendance at car auctions does not constitute employment because it is infrequent. Tr. 140.

*E. Pamela H. White*

The Employer submitted a Labor Market Survey prepared by Pamela H. White, a Vocational Rehabilitation Consultant for The Directions Group, Inc. EX 1. While Ms. White did not meet with the claimant, she did review the pertinent records in this case. Id. at 1. Ms. White opined that, while the impact claimant's heart condition has on his employability is unclear, "[i]t is my vocational opinion that an otherwise

healthy individual with Mr. Browder's back history remains employable. While the individual would be limited in the number and scope of jobs that he can pursue, work remains available in the open labor market on a frequent to constant basis." Id. at 8.

*F. Lucille Browder*

Lucille Browder is Claimant's wife. Mrs. Browder testified as to the nature of her business, Premier Motor Cars. Tr. 145. Premier Motor Cars is a limited liability company; Mrs. Browder is a member of the company, Mr. Browder is not. Tr. 148. She characterized Claimant's activities at her company as a way for him to "feel like he was contributing, and that he was doing something." Tr. 150.

Mrs. Browder also testified about her husband's physical condition after his injury. Tr. 155. Claimant was in constant back pain following the August, 2000 injury and could not sleep at night. Id. Claimant also complained about numbness in his left leg, and has even fallen down the stairs at his home due to the numbness in his leg. Id. Mrs. Browder stated that Claimant's complaints about his pain did not change following his December, 2000, attempt to play golf. Tr. 156. Mrs. Browder also testified that Claimant is so ill that he is unable to help with the household in any way, and is depressed. Tr. 164 – 166.

*G. Brian Woods*

Brian Woods is a marine mechanic formerly employed by Ross Marine. Tr. 178. On August 8, 2000, Mr. Woods found Claimant lying on the ground next to the Sea Bee Spirit clutching his chest. Tr. 179. Mr. Woods thought Claimant was having a heart attack, since he knew of Claimant's history of heart disease. Id. Mr. Woods went to check on Claimant and, after learning that he was not having a heart attack but had fallen off of the boat, helped him back to his office. Tr. 180. Claimant told Mr. Woods that his back was hurting. Id. When they arrived at the office, Mr. Woods heard Claimant tell Vicki Haught, the human resources manager for Ross Marine, that he fell and that he was going to go lie down. Tr. 181.

Mr. Woods also testified that Claimant worked in the yard frequently, and was in charge of moving the big boats. Tr. 182.

*H. Jason Browder*

Jason Browder is Claimant's son; he worked with his father at Ross Marine from 1998 – 2000. Tr. 185, 186. He testified that there were times when his father would assist the painting and fiberglass crews with their work in the shipyard. Tr. 188. Furthermore, he stated that since the August, 2000 injury, Claimant's physical condition is such that he has difficulty walking, cannot participate in even simple household chores, is constantly out of breath, and walks with an uneven gait. Tr. 190-92.

*I. Bill Jones*

Bill Jones worked at Ross Marine at the same time as Claimant. Tr. 195. Mr. Jones testified that he observed Claimant working as a salesman, rather than as a manual laborer. Tr. 197-198. Mr. Jones also stated that Claimant returned to work after his accident and that he continued working "no different than before." Tr. 199. Mr. Jones also testified to observing Claimant on a monohull sailboat in the harbor after his accident, stating, "he could have just been riding on the boat" as opposed to doing anything physically demanding on the boat. Tr. 199 – 202.

*J. Arthur Swaggert*

Mr. Swaggert is the president and owner of Ross Marine. Tr. 204. Mr. Swaggert stated that he hired Claimant for his expertise in making estimates on damaged vessels. Tr. 207. Claimant's job title was sales manager. Tr. 209. According to Mr. Swaggert, Claimant spent "a lot of time . . . in the office developing estimates for work that was either called or was in the yard." Tr. 208. Claimant's duties in the yard included doing "an on site inspection of a vessel to determine the cost of the repairs, to develop an estimate for a potential customer, or a vessel that was damaged that came into the yard." Id. Claimant was occasionally required to travel for his work. Tr. 209. Mr. Swaggert testified on cross-examination that Claimant's presence on the Sea Bee Spirit on the day of his accident was work-related, and that it was common for members of upper management at Ross Marine to be "out in the yard, doing things around ships." Tr. 220-21.

Mr. Swaggert testified that Claimant never worked on commercial vessels at Ross Marine. Tr. 209. Claimant only occasionally performed sea trials, and was never required to do so. Tr. 210.

When Claimant was injured, Mr. Swaggert drove him to the hospital. Tr. 212. Since Claimant believed he was suffering from kidney stones, Mr. Swaggert waited until an urologist arrived and claimant was taken in for x-rays. Id. Claimant did not tell Mr. Swaggert at the time that he had fallen off of the Sea Bee Spirit. Id.

Mr. Swaggert testified that the first time the company became aware of a work-related accident was in March, 2001, when Claimant called Vicki Haught. Tr. 214. However, Mr. Swaggert also stated that he knew Claimant had been out in the shipyard when his pain began and that he knew he was having pain in his back, and he had heard rumors that Claimant fell. Tr. 225 – 226, 230. Mr. Swaggert maintained that Claimant was terminated from his employment for reasons other than his workmen's compensation claim. Tr. 215. Mr. Swaggert was aware of Claimant's heart condition. Tr. 227 – 28.

*K. Vicki Haught*

Vicki Haught is the office manager for Ross Marine. Tr. 231. Ms. Haught's testified that the receptionist came and got her, saying:

> David had been sitting up on the couch with a customer reviewing a bill, or estimate, or whatever, and that he went to stand up and that he had to sit back down, that he didn't feel too good . . . . [H]e said that his back was bothering him a little bit, that

> earlier that day he had walked across the tool room and had felt a twinge in his back. And that later on he had went down to the Sea Bee Spirit . . . and that coming down off the ladder he felt another twinge and that he had to get Jason to help him walk up to the office.

Tr. 232 – 33.

Ms. Haught testified that Claimant's condition seemed to worsen, and they all decided he should go to the emergency room. Tr. 234. Ms. Haught stated that he never told her he fell:

> Earlier that day when we were up front sitting there he joked around, I guess, because of saying he – with his back he joked around. He goes, well, I could file a workers' comp. And I was like, for what? He goes, well, no, I would never do that. . . . And kind of just joking back and forth, and then that was it.

Tr. 234.

Ms. Haught testified claimant continued in his same work capacity following the August 2000 injury. Tr. 236. She stated she was not aware of any claim until March, 2001. Tr. 237.

*L. Paul Buceti*

Mr. Buceti is a private investigator hired by Ross Marine to conduct surveillance on Claimant from January 3, 2005 through January 7, 2005. Tr. 246. Mr. Buceti observed Claimant at Premier Motor Cars "going in and out of the side door, the front door, smoking a cigarette, on the cell phone, drinking a soda. And on one occasion I saw him get into a vehicle with a female and drive away." Tr. 247.

Mr. Buceti called Claimant's cell phone number since it was listed in an Auto Trader advertisement. Tr. 249. When Claimant answered the telephone, he gave Mr. Buceti details about the car and its condition, and told him that it rode well, and that he had taken up to 105 miles per hour with no problem. Tr. 250. However, when Mr. Buceti wanted to come see the car, Claimant advised Mr. Buceti that he would not be present to show him the car, and referred him to another employee. Tr. 250.

*M. Alan Fogle, M.D.*

Dr. Fogle, a urologist, examined claimant in the emergency room at Roper Hospital on August 9, 2000 – the day of the injury at issue in this case. EX 2. "X-rays were done which ruled out the presence of a urologic process. Therefore, Dr. Fogle did not render any treatment to Mr. Browder and no charges were filed." Id. at 17. Dr. Fogle stated in a letter to employer's counsel dated June 10, 2003, "there was no predisposing history of injury that I can recall" relating to claimant's treatment on August 9, 2000. Id. at 18.

*N. Mike O. Tyler, Jr., M.D.*

Mike O. Tyler, Jr., M.D., was deposed in this matter on June 5, 2003. CX 24. His medical records are also part of the record in this case. CX 9. Dr. Tyler is a neurosurgeon. CX 24 at 261.

In his March 12, 2002, office note, Dr. Tyler recounted Claimant's medical history. Dr. Tyler recorded that Claimant was injured when he fell at Ross Marine. EX 8 at 30.

> Initially with his fall, his major pain was in his chest, but then within a short period of time he started having severe low back pain the same day as the injuries. This pain was so severe he thought he had kidneys [*sic*] stones. He had difficulty walking because of this . . . . The patient was treated conservatively. He went to a chiropractor for two months, but the pain did not get better. Then, finally one day while swinging a golf club, the pain became much worse. He tried epidural steroids and ultimately in April of 2001 had a lumbar laminectomy done by Dr. Curtis Worthington. At that time he was having, and still remains to have, severe left leg and buttocks pain. He also has some numbness along the S1 distribution on the left side and weakness in the gastrocnemius muscles on the left side. The patient said that for about the first two days after surgery he felt well, but shortly thereafter his pain started getting worse. He had an MRI scan about five to six weeks after surgery and had a myelogram about the same time.

Id.

Dr. Tyler prepared an Opinion of Treating Physician as to Causation, Treatment and Restrictions in this case. CX 9 at 102. In that Opinion, Dr. Tyler stated, "it is my opinion that he [claimant] injured his back during his fall while working for Ross Marine on August 9, 2000. It is also my opinion that all of my treatment including the surgery of March 29, 2002, all MRI scans, prescriptions ordered by me were caused by the back injury of August 9, 2000." Id.

Furthermore, Dr. Tyler opined, "David Browder cannot return to his former job with Ross Marine or perform the tasks required of a marine inspector or surveyor. Further it is unlikely that he will ever be able to perform the tasks required of an inspector or surveyor. David's incapacity to return to any work is further supported by his cardiac condition." Id. at102-103.

*O. William B. Ellison, Jr., M.D.*

Dr. Ellison is claimant's cardiologist. CX 10 at 107. In an opinion dated December 4, 2003, Dr. Ellison wrote:

> The fall he sustained [at Ross Marine] resulted in a severe back injury that has required two surgeries and has limited his ability to follow the regimen of the recommended rehabilitation program. This has greatly decreased the progressive improvement expected in his cardiac condition following bypass surgery. Mr. Browder's cardiac condition will, in fact, be expected to worsen because of the limitations on his activities. His cardiac condition now imposes a significant limitation upon his ability to carry out his work duties when considered in

> conjunction with the injury to his back. It is my opinion that the combined effect of his cardiac condition and the back injury results in his total disability.

Id. at 110.

*P. Marc N. Dubick, M.D.*

Dr. Worthington referred claimant to Dr. Dubick. CX 12 at 127. According to Dr. Dubick's notes for a November 13, 2001, appointment, claimant had a "longstanding history of radicular problems in his back" dating from his accident; he "develop[ed] severe pain in his lower back later that day. Approximately 3 weeks later, he began experiencing some numbness in his left leg in the S1 distribution." Id. Dr. Dubick referred claimant for rehabilitation, and scheduled a series of nerve blocks to help address claimant's pain.

Dr. Dubick's notes, which continue through March 14, 2002, reveal a consistent history of back pain and numbness in the left leg despite the treatment claimant received. EX 12.

*Q. William Wilson, M.D.*

Dr. Wilson was deposed in this matter on June 25, 2003. CX 25 at 284. Dr. Wilson is the Browder family physician. Id. at 292. Dr. Wilson testified that Claimant's back pain had been caused from his fall, and that his back injury has complicated his cardiac condition. Id. 291-92. Furthermore, Dr. Wilson has diagnosed Claimant with depression, stemming from his inability to work and provide for his family. Id. Dr. Wilson believes Claimant is unable to work. Id. at 289-90.

Dr. Wilson explained his August 11, 2000 office note – which does not include reference to Claimant's fall – was incomplete, and that his addendum to that note, including information about Claimant's work injury, is more accurate. Id. at 285 – 286.

*R. Roberta F. Karnofsky, M.D.*

Claimant saw Dr. Karnofsky on December 26, 2000, for an epidural to address his ongoing back pain. In her history of Claimant's condition, the doctor wrote:

> He has a history of low back pain since he pulled something in his back in August of this year, however that pain resolved after one visit in the Emergency Room and IV Demerol. The pain did not entirely go away and he has had some mild discomfort in the back until approximately two weeks ago at which time he was playing golf and the pain returned rapidly with radiation in to the left leg and down the leg to the feet. The pain is described as severe and incapacitating with associated numbness and weakness in that extremity.

EX 3.

*S. Julius R. Ivester, Jr., M.D.*

Dr. Ivester also treated Claimant's pain with an epidural steroid injection on December 22, 2000. EX 6. Dr. Ivester described Claimant's history: "Mr. Browder is a 44-year-old male with a history of injury to his lower back in August who one month ago developed progressive severe low back and left leg pain. . . . The pain has become severe over the last week." Id.

*T. Curtis Worthington, M.D.*

Dr. Worthington first evaluated Claimant on January 12, 2001. CX 8 at 60; EX 7. Dr. Worthington recorded that Claimant's back, left buttock, and left leg pain was "initially caused by his slipping from a boat ladder." CX 8 at 60. Claimant improved with Demerol and restricted activity. Id. "He had some waxing and waning of the pain until mid-December when he played golf. On the first hole, he had such excruciating pain down the leg that he had to stop, go home, and lie down." Id.

*U. Michael L. Coon, D.C.*

Claimant visited his chiropractor, Dr. Michael Coon, on December 18, 2000. EX 5 at 25. Dr. Coon's office note for that visit states:

> The patient presents in the office slightly forward in an antalgic posture of the low back with intermittent numbness in the leg. He states it was bothering him on Friday, he contacted his family physician who phoned in Codeine. He states he thought he was feeling some better, and attempted to go golfing over the weekend. He states after the first hole he realized it was impractical and returned home. He spent the remainder of the weekend bedresting. He presents in the office with low back discomfort, intermittent sciatica.

Id.

## VI. DISCUSSION

*A. Coverage*

The first issue this Court must address is whether Claimant is able to fulfill the status requirement, and thus avail himself of coverage under the Longshore Act.

Prior to the 1972 Amendment of the Act, a worker injured upon navigable waters was covered by the Act without an inquiry into what he was doing at the time of his injury. A longshore or harbor worker injured on the landward side of the dock, however, could not collect LHWCA benefits, and was left with state workers' compensation benefits as his sole remedy. The 1972 Amendment added the status test, extending LHWCA coverage to "maritime employees" who perform their duties on land areas adjoining the navigable waters. See 33 U.S.C. § 902 (3). Maritime workers were thus permitted to collect under the LHWCA even if they were injured on land, so long as they satisfied the following two-part "status and situs" test:

(1) Status – the worker must be a maritime employee, such as a longshoreman, shipbuilder, or ship repairman engaged in loading, unloading, constructing, or repairing a vessel of at least eighteen net tons in size. See 33 U.S.C. § 902 (3)

(2) Situs – the worker's injury must occur on navigable waters of the United States, or on a coterminous dry dock, pier, wharf, terminal building, marine railway "or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." See 33 U.S.C. § 903 (a).

Here, Employer challenges Claimant's coverage under the Act based on Claimant's status as a maritime worker. Employer's Brief at 5.

The Supreme Court held in 1983 that Congress did not intend to withdraw any coverage when it passed the 1972 Amendment, which added the status requirement and expanded the situs definition. Therefore, any worker injured on navigable waters could claim under the LHCWA regardless of whether he met the statute's "status requirement of being a 'maritime employee'." Director, Office of Workers' Compensation Programs v. Perini N. River Assoc. 459 U.S. 297 (1983).

Thus, if a worker is injured on a navigable water situs, he need only show that he works for a maritime employer in order to be eligible for LHWCA benefits. If the same worker is injured, instead, on an adjoining dock, pier, wharf, dry dock or loading area, he must also prove that his particular job is of a "traditionally maritime" status, or connected to ship-loading, shipbuilding, ship-repairing, et cetera to claim LHWCA eligibility.

In Chesapeake & Ohio Ry. Co v. Schwalb, 493 U.S. 40 (1989), the Supreme Court reiterated its holding from Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985), that land-based work may constitute maritime employment, and, accordingly, be subject to the jurisdiction of the LHWCA, if the employee was involved in the essential or integral elements of the loading or unloading process. Schwalb, 493 U.S. at 46; see also Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

While 33 U.S. C. § 902 (3) enumerates specific occupations and activities, the Supreme Court has held that other activities may be covered under the act if they are sufficiently maritime in nature. P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); Sanders v. Ala. Dry Dock & Shipbuilding Co., 841 F.2d 1085 (11th Cir. 1988). The status test is satisfied when an employee is involved in essential or integral elements of the loading or unloading process [and the ship building and ship repair process]. Chesapeake & Ohio Ry. v. Schwalb, 493 U.S. 40, 46-47 (1989); see also Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

In the Fourth Circuit, the proper inquiry is "whether the employee's assigned job requires his spending some of his time in indisputably longshoring operations." In Re: CSX Transp. Inc. (Shives v. CSX Transp. Inc.), 151 F.3d 164, 169, 32 BRBS 125, 129 (CRT) (4th Cir. 1998). Employer argues that the Fourth Circuit's use of the word "assigned" in Shives prevents

Claimant's coverage under the Act: "even if a portion of the Claimant's job activities were construed so as to constitute maritime employment, these activities were not assigned to Claimant but were performed of his own accord." Employer's Brief at 6. Upon review, however, Claimant's employment contract with Ross Marine indicates that his assigned tasks included:

1. Sell the services and merchandise to the prospective customers of Ross Marine under direction of the General Manager.

2. Submit written specifications and estimates of prospective customers to the General Manager.

3. Follow up on scheduling and performance of work.

4. Maintain contacts with owners and captains to ascertain their satisfaction with progression of work package and Quality Assurance of work accomplished.

5. Generally promote goodwill between customer and Ross Marine and suggest improvements in operations that will accomplish this goal.

6. Miscellaneous duties to promote Ross Marine welfare.

EX 13 at 58-9.

Thus, it appears that Claimant's assigned work duties were fairly broad under his contract. Claimant testified that he was on the Sea Bee Spirit at the time of his injury to inspect a paint job, and he testified that he was out in the yard frequently to help with repairs and inspect work. Tr. 27. This activity is in keeping with Claimant's contractual obligation to maintain "Quality Assurance" and to otherwise promote Ross Marine. Furthermore, Mr. Swaggert testified that Claimant's presence on the Sea Bee Spirit on the day of his accident was work-related, and that it was common for members of upper management at Ross Marine to be "out in the yard, doing things around ships." Tr. 220-21.

Claimant's activities in inspecting and checking for quality assurance are maritime activities, as they are "essential or integral" to Employer's maritime operations. Schwalb, 493 U.S. at 46; see also Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). Without quality assurance and inspection, Employer's shipbuilding and repair business could not function.

Furthermore, Claimant's maritime activities were not "so de minimis as to defeat coverage." Shives, 151 F.3d at 170. Rather, the weight of the testimony produced at trial and by deposition indicates that Claimant's regular job duties included inspection, quality assurance, and assistance in making repairs on the ships at Ross Marine.

*B. Res Judicata / Collateral Estoppel*

*Res judicata* (claim preclusion) and collateral estoppel (issue preclusion) apply only after entry of a final order that terminates the litigation between the parties on the merits of the case.

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373 (1981); St. Louis Iron Mountain & S. Ry. Co. v. Southern Express Co., 108 U.S. 24, 28-29 (1883). Res judicata and collateral estoppel can only be given effect when the legal standards are the same in both the previous and current jurisdictions. Wilson v. Norfolk & Western Railway Co., 32 BRBS 57 (1998). See also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 583 F.2d 1273, 8 BRBS 723 (4th Cir. 1978), cert. denied, 440 U.S. 915 (1979); Barlow v. Western Asbestos Co., 20 BRBS 179 (1988). Finally, the party claiming *res judicata* or collateral estoppel must show identity of parties in the current and prior suit. Keith v. Aldridge, 900 F.2d 736, 739 (4th Cir.) cert. denied 454 U.S. 878 (1981).

Here, Employer is claiming *res judicata* / collateral estoppel as to the factual findings in the decision of the South Carolina Workers' Compensation Commission regarding Claimant's state compensation claim. That decision was however overturned – even as to its factual findings – by the South Carolina Court of Common Pleas. Browder v. Ross Marine, Case No.: 05-CP-10-467 (May 20, 2005). Thus, the Commission's decision cannot form a basis for Employer's *res judicata* or collateral estoppel argument since it was not the final judgment in the case.

*C. Section 913 Statute of Limitations*

Section 13(a) of the Act provides in pertinent part,

> Except as otherwise provided in this section, the right to compensation for disability . . . under this Act shall be barred unless a claim therefore [*sic*] is filed within one year after the injury or death. . . . The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

In this case, Claimant was injured on August 9, 2000. He did not file his claim for benefits until May 1, 2002. EX 14. Employer argues that Claimant knew or should have known that his injury would impair his wage earning capacity on January 23, 2001, when he was diagnosed with a free fragment at L5-S1 and surgery recommended. Employer's Brief at 11.

Claimant, on the other hand, asserts that Section 30(f) of the Act controls this situation since Employer did not file Form LS-202, First Report of Injury, until May 14, 2002. Section 30(f) states:

> Tolling provision. Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 13 of this Act [33 USC § 913(a)] shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section.

33 U.S.C. § 930(f).

In Kowaleviocz v. John T.Clark & Son of Maryland, Inc., 11 BRBS 453 (1979), aff'd at 14 BRBS 154 (1981), the Board discussed the application of the Section 30(f) tolling provision:

> The Board has adhered to the view that knowledge by the employer that the employee has sustained an injury is sufficient knowledge under Section 30(f). See Glover v. Aerojet-General Shipyard, Inc., 6 BRBS 559, BRB No. 76-291 (Aug. 26, 1977). The Fifth and Third Circuits have added the further requirement that the employer must have knowledge of the job-related nature of the injury. See United Brands v. Melson, 594 F.2d 1068, BRBS, (5th Cir. 1979), aff'g 6 BRBS 503 , BRB No. 76-227 (Aug. 23, 1977); Strachan Shipping Co. v. Davis, 571 F.2d 968, 8 BRBS 161 (5th Cir. 1978), rev'g 2 BRBS 272 , BRB No. 75-102 (Sept. 18, 1975); Sun Shipbuilding & Dry Dock Co. v. Bowman, 507 F.2d146 (3d Cir. 1975). However, the Fifth Circuit left open the issue of whether an employer has a duty to conduct further investigation upon being informed of an employee's illness. See Strachan, supra. Neither the Board nor any court has interpreted Section 30(f) so restrictively as to provide that an employer must have definite knowledge that the injury comes within the jurisdiction of the Act in order for Section 30(f) to apply. See also Jones v. Newport News Shipbuilding & Dry Dock Co., 5 BRBS 323 , BRB No. 76-320 (Jan. 4, 1977), aff'd, 573 F.2d 167, 8 BRBS 241 (4th Cir. 1978).

Id. at 460.

In Jones v. Navy Exchange, 966 F.2d 1442 (Table) (4th Cir. 1992), the court found that Section 30(a) did not toll the filing period since the employer did not know of the claimant's injury until after the limitations period expired. When an employer does not know of an injury, the employer has no reason to file an injury report. Additionally in Jones, the court noted that, "Mere knowledge of an accident at work does not satisfy the knowledge requirement of Section 30(a). Rather, the [LHWCA] requires knowledge of the injury and of facts that would lead a reasonable man to conclude that compensation liability is possible and there is a need to investigate further." See Stevenson v. Linens of the Week, 688 F.2d 93 (D.C. Cir. 1982); Williams v. Nicole Enterprises, Inc., 19 BRBS 66 (1988).

In this case, it is undisputed that the president and owner of Ross Marine drove Claimant to the hospital on the day of his injury. Tr. 212. Although Mr. Swaggert testified that the first time the company became aware of a work-related accident was in March, 2001, he also admitted that he knew before that time that Claimant had been out in the shipyard when his pain began, that he knew Claimant was having problems with back pain, and that he had heard rumors that Claimant fell. Tr. 225-226, 230.

Vicki Haught, the office manager for Ross Marine who handled workers' compensation claims, testified that Claimant told her to file a workers' compensation claim on August 9, 2000, but she thought he was joking. She also testified that Claimant never told her that he fell, but

that "he felt another twinge" in his back while he was climbing down from the Sea Bee Spirit. Tr. 232-34.

Given this evidence, it is possible Employer did not have actual notice of Claimant's injury until March, 2001. However, Mr. Swaggert, the president and owner of Ross Marine, certainly had knowledge of the injury and of facts that would lead a reasonable person to conclude that compensation liability was possible and there was a need to investigate further. I find Mr. Swaggert had that knowledge since he knew Claimant was in severe pain on August 9, 2000, subsequently learned that Claimant was still having back pain, and even heard rumors that Claimant fell at the job site.

The §30(f) tolling provision was therefore triggered in this case, and the time limit under the statute of limitations began to run upon the Employer's filing of the First Report of Injury, on May 14, 2002. Since Claimant filed his claim on May 1, 2002, his claim is therefore timely.

*D. Section 912 Notice Requirement*

Employer argues that Claimant is barred from receiving benefits due to his failure to give notice of a compensable injury within thirty days of the injury, pursuant to Section 12(a) of the Act. 33 U.S.C. §12(a). Claimant, on the other hand, argues that this case falls under Section 12(d), which provides in pertinent part:

> (d) Failure to give such notice shall not bar any claim under this Act (1) if the employer (or his agent or agents or other responsible officials or officials designated by the employer pursuant to subsection (c)) or the carrier had knowledge of the injury or death . . . . [or] (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice. . . .

In Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32 (1989), the Benefits Review Board discussed the meaning of "imputed knowledge" in Section 12(d). In that case, the Board concluded that the "employer must have knowledge not only of the fact of claimant's injury but also of the work-relatedness of that injury." Id. at 35.

Here, as discussed *supra*, Mr. Swaggert, the owner and president of Ross Marine, had knowledge that Claimant experienced severe pain on August 9, 2000, that he continued to have back pain, and heard rumors that Claimant had fallen at work. Furthermore, Ms. Haught, the person in charge of submitting compensation claims for Ross Marine, testified that she knew Claimant experienced back pain while climbing off of a yacht in the shipyard and that he subsequently missed work because of that pain. Thus, I find Employer had sufficient knowledge of a work-related injury to bring this case within Section 12(d)(1)'s provisions.

*E. Fact of Compensable Injury and Independent Intervening Cause*

Employer argues "that the Claimant's testimony is not credible and that a review of all the evidence in the record indicates that the Claimant did not sustain a work-related injury on August 9, 2000 . . . [and] that the Claimant's back problems are not causally related to the alleged injury by accident." Employer's Brief at 27.

To proceed under the Act, the Claimant must establish a *prima facie* case. The Section 20 (a) presumption does not apply in establishing the Claimant's *prima facie* case. Rather, the Claimant establishes a *prima facie* case by proving that he suffered some harm or pain. Murphy v. SCA/Shayne Brothers, 7 BRBS 309 (1977), aff'd mem., 600 F.2d 280 (D.C. Cir. 1979), and than an accident occurred or working conditions existed which could have caused the harm. Kelaita v. Triple A. Mach. Shop, 13 BRBS 326 (1981). In presenting his case, the claimant is not require to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, the claimant must show that working conditions existed which could have caused his harm. See generally U.S. Industries/Federal Sheet Metal, Inc., 455 U.S. at 608, 14 BRBS at 631.

Claimant has sustained an "injury" where he has some harm or pain, or if "something unexpectedly goes wrong within the human frame." Wheatley v. Adler, 407 F.2d 307, 313 (D.C. Cir**.** 1968) (en banc). Here, Claimant has suffered an injury to his back within the meaning of the Act. The evidence provided in medical records and in the medical opinions submitted by Claimant are consistent with and give weight to Claimant's testimony that he has suffered back pain since August 9, 2000. Tr.29-31, Tr. 178-80, Tr.209-212, CX 24, CX 10, CX 12, CX 25, EX 3, EX 6, CX 8, EX 5; see Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962) (holding, "the factfinder is entitled to weigh the medical evidence and to draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner.")

Claimant has also established the second part of his *prima facie* case: work conditions existed which could have caused his injury. Claimant testified that he climbed up on a ladder and, as he was climbing down the ladder, it slipped, causing him to fall. Tr. 29. Brian Woods, another employee, testified that he found Claimant lying on the ground in obvious distress next to the Sea Bee Spirit on August 9, 2000. Tr. 178. Finally, it is undisputed that Claimant's job did involve going onto boats occasionally to check the status of repair work, which would obviously necessitate climbing. Work conditions therefore existed which could have caused Claimant's back injury.

I find Claimant has established a *prima facie* case under the Act and is entitled to the Section 20(a) presumption that his injury is related to his longshore employment. 33 U.S.C. 920(a).

Once the Section 20(a) presumption applies, the burden shifts to the Employer to sever the causal connection between the employment and the injury. Dower v. General Dynamics Corp., 14 BRBS 324 (1981). Employer must produce facts, not speculation, to overcome the presumption of compensability, and reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created in Section 20(a). Dearing v. Director, OWCP, 27 BRBS 72 (CRT) (4th Cir. 1993)(Unpublished) (medical evidence constituted substantial evidence to support employer's rebuttal and sole medical evidence on claimant's behalf was equivocal).

However, when there has been a work-related accident followed by an injury, the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption. Stevens v. Todd Pac. Shipyards, 14 BRBS 626 (1982), aff'd mem., 722 F.2d 747 (9th Cir. 1983), cert. denied, 467 U.S. 1243 (1984); Champion v. S & M Traylor Bros., 14 BRBS 251 (1981), rev'd and remanded, 690 F.2d 285, 15 BRBS 33 (CRT) (D.C. Cir. 1982).

Once an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome and it no longer controls the result. Travelers Ins. Co. v. Belair, 412 F.2d 297 (1st Cir. 1969); John W. McGrath Corp. v. Hughes, 264 F.2d 314 (2d Cir.), cert. denied, 360 U.S. 931 (1959).

Here, Employer "assert[s] that substantial evidence in the record indicates that the alleged incident did not cause the Claimant's back problems. The evidence in the record indicates that, once the Claimant was informed that he would need back surgery in late February or early March 2001, he contacted the Employer to report the alleged incident." Employer's Brief at 27. Furthermore, Employer asserts that Claimant's back was actually injured, or at least aggravated, by his attempting to play golf in December 2000, and that Claimant's one golf swing gave rise to an intervening cause for his disability. Employer's Brief, 28-30, 35-40.

Employer is correct that "in an LHWCA case, an intervening cause may sever the causal connection between an original work-related injury and subsequent consequences a worker may suffer. The employee's own deliberate conduct may constitute such an intervening cause. If the remote consequences are the direct result of the employee's unexcused, intentional misconduct, and are only the indirect, unforeseeable result of the work-related injury, the employee may not recover under the LHWCA." Bludworth Shpyard v. Lira, 700 F.2d 1046, 1051 (5th Cir. 1983).

Employer relies on the Blue Cross Blue Shield Subrogation Questionnaire in which Claimant answered a question regarding whether treatment was necessary as a result of an on-the-job accident, "I don't know how to answer this question because I do not know when this injury really happened." EX 11 at 43-4; Employer's Brief at 39-42. Employer, however, submitted no medical evidence to show that Claimant's back injury was caused by this single golf swing. While Dr. Tyler testified that a golf swing could cause a herniated disc, he stated to a reasonable medical certainty that a fall was more likely to cause this injury. CX 24 at 280.

The medical evidence in this record overwhelmingly supports Claimant's assertion of causation. Dr. Tyler (CX 24), Dr. Ellison (CX 10), and Dr. Wilson (CX 25) all opined that Claimant's condition is causally related to the August 9, 2000 accident, not the December, 2000 golfing incident.

Employer relies on medical evidence from Dr. Fogle, the urologist who tested Claimant for kidney stones – not back injury – on the day of the accident, and the medical history Dr. Karnofsky recorded prior to treating Claimant for back pain. Both Dr. Fogle and Dr. Karnofsky treated Claimant briefly – Dr. Fogle to rule out kidney stones on August 9, 2000, EX 2, and Dr. Karnofsky to administer an epidural steroid injection on December 26, 2000. EX 3. Neither Dr. Fogle nor Dr. Karnofsky rendered an opinion in this case; Employer's argument is based on the medical history taken from Claimant at the time of treatment. At each appointment, the doctors noted Claimant was in considerable pain and distress. EX 2, EX 3. On the other hand, Dr. Tyler, Dr. Ellison, and Dr. Wilson all treated Claimant over a long period of time and had greater opportunity to observe Claimant's condition, examine Claimant, and become familiar with his situation. Thus, I give greater weight to Dr. Tyler, Dr. Ellison, and Dr. Wilson. Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962).

For these reasons, I find that the Claimant's testimony as to his back injury is credible, as it is supported by the testimony of Brian Woods, who found Claimant lying next to the Sea Bee Spirit on the day of the accident, and by the medical evidence which shows a long history of back pain stemming from the August 2000 injury. I furthermore find that the Section 20(a) presumption has not been rebutted: Claimant's back condition and resulting disability were caused by the August 9, 2000 accident.

For argument purposes let us assume that the Blue Cross Blue Shield questionnaire and the reports of Drs. Fogle and Karnofsky are sufficient for rebuttal of the Section 20(a) presumption. At this point the administrative law judge must weigh all of the evidence and resolve the case on the record as a whole. Under the substantial evidence rule, the administrative law judge's findings must be based on such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

As previously stated, the reports from Drs. Tyler, Ellison, and Wilson clearly outweigh the essentially non-committed statements from Drs. Fogle and Karnofsky. The evidence of record strongly favors the claimant on the question of relating the back impairment to an on the job injury.

*F. Nature and Extent of Disability*

Employer argues Claimant is not disabled and is currently employed at Premier Motor Cars.

The Section 20(a) presumption does not aid the Claimant in establishing the nature and extent of disability. Holton v. Independent Stevedoring Co., 14 BRBS 441 (1981); Duncan v. Bethlehem Steel Corp., 12 BRBS 112 (1979). See also Brocato v. Universal Maritime Serv. Corp., 9 BRBS 1073 (1978); Davis v. George Hyman Constr. Co., 9 BRBS 127 (1978), aff'd in relevant part sub nom. Davis v. U.S. Dep't of Labor, 646 F.2d 609 (D.C. Cir. 1980); Hunigman v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 141 (1978).

**Existence of Disability**

In this case, "the burden was upon the claimant to demonstrate continuing temporary or permanent disability as a result of the injury" of August 9, 2000. Holton, 14 BRBS at 443. "If credible, a claimant's testimony regarding the existence of a disability may constitute a sufficient basis for an award of compensation." Id., citing Eller & Co. v. Golden, 620 F.2d 71 (5th Cir. 1980). Whether a witness is credible is an issue for the factfinder. John W. McGrath Corp v. Hughes, 289 F.2d 403 (2d Cir. 1961).

The factfinder also may consider medical evidence in making the determination of the nature and extent of injury: "the factfinder is entitled to weigh the medical evidence and to draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner." Todd Shipyards, 300 F.2d 741 (5th Cir. 1962).

Additionally, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966); Rajotte v. Gen. Dynamics Corp., 18 BRBS 85 (1986). Also, when a claimant sustains an injury at work

which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural, unavoidable result of the initial work injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981).

Here, Claimant's physicians have opined that he is totally disabled due to the combination of his pre-existing cardiac condition and his back injury. CX 25 at 290 (Deposition of Dr. Wilson); CX 24 at 280-81 (Deposition of Dr. Tyler); CX 9; CX 10 at 110 (opinion of Dr. Ellison).

The parties also presented vocational evidence. Jean Hutchinson evaluated Claimant and concluded that he is unemployable. Tr. 137-8. She also testified that Claimant's activities at Premier Motor Cars did not constitute employment since those activities were infrequent and Claimant does not have set hours or set job duties. Tr. 139. Pamela White, another vocational consultant, reviewed the record in this case and concluded, "an otherwise healthy individual with Mr. Browder's back history remains employable." EX 1 at 8. Ms. White did not, however, evaluate the impact that claimant's heart condition has on his employability. Id.

Employer also presented evidence that Claimant raced his sailboat following his injury. Tr. 120-23; Tr.199-202. Mr. Clausen, who was on Claimant's sailboat when it won the 2001 Palmetto Cup testified that Claimant was heavily medicated during the race, "to the point where it was pretty scary to race with him." Tr. 123. Mr. Jones, who testified to seeing Claimant on a sailboat after his accident, testified that he did not see Claimant doing anything physically demanding: "he could have just been riding on the boat." Tr. 199-202.

Finally, Employer presented evidence of Claimant's involvement in Island Catamaran, attendance at car auctions and activities at Premier Motor Cars as evidence that he is still able to work. Tr. 246-9; Employer's Brief at 18-23.

Once again, I find that the weight of the evidence on this issue supports the Claimant. First, Employer's vocational expert did not evaluate the impact of Claimant's pre-existing heart condition; thus, her testimony does not fully address the issue of Claimant's ability to work. Second, three of Claimant's treating physicians testified to a reasonable medical certainty that he is unable to work due to his injury and the resulting complication of his heart condition. Employer presented no contrary medical evidence. Third, Ms. Hutchinson addressed Claimant's activities at Premier Motor Cars and concluded that they did not constitute employment. Finally, Claimant did not earn any income from Island Catamaran, and Claimant testified that he was too ill to continue in his role as general manager of Island Catamaran by March, 2001 . Tr. 43-5; 101-2.

For the forgoing reasons, I find Claimant is totally disabled due to his August 9, 2000, work-related accident and his pre-existing cardiac condition.

**Nature of Disability**

This Court must also determine the nature of Claimant's disability. "The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of 'maximum medical improvement.'" Trask v. Lockheed Shipbuilding & Constr. Co., 17 BRBS 56, 60 (1985) (citing McCray v. Ceco Steel Co., 5 BRBS 537 (1977)). A finding that Claimant's

condition has stabilized "is tantamount to a finding that [C]laimant reached maximum medical improvement on that date." Seidel v. Gen. Dynamics Corp., 22 BRBS 403, 407 (1989). Furthermore, a disability will be considered permanent if the Claimant's impairment has continued for a lengthy period of time and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, 654 (5th Cir. 1968). The Fifth Circuit explained:

> The determination that a disability is temporary rather than permanent need not be reached merely because the medical prognosis is that the employee is likely at some indefinite future date to get better and to be able to return to work. The [Longshore Act] neither requires that a longshoreman be bed-ridden before he is considered totally disabled nor that he be pronounced medically incurable before his condition is permanent.

Watson, 400 F.2d at 654.

The date of maximum medical improvement is a question of fact based on medical evidence. Williams v. Gen. Dynamics Corp., 10 BRBS 915 (1979). The medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not further improve. Trask, 17 BRBS at 60; Mason v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). Maximum medical improvement cannot, however, be based on the mere speculation of a physician. Steig v. Lockheed Shipbuilding & Constr. Co., 3 BRBS 439, 441 (1976). The Administrative Law Judge "is entitled to weigh the medical evidence and to draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner." Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962).

Claimant does not cite nor could this Court determine on this record the date maximum medical improvement was reached in this case. Therefore, Claimant is entitled to temporary total disability benefits beginning March 1, 2001, and continuing, as Claimant testified that he was replaced by a general manager in March, 2001, and has not worked since that time. Claimant is also entitled to medical expenses arising from his injury, but there is insufficient evidence in this record to determine whether those expenses should include psychiatric treatment for depression and treatment for narcotics addiction from pain medication.

*G. Section 8(f) Relief*

Discussion of this issue requires a finding of permanent partial or permanent total disability. The date of MMI is uncertain in this case. Such a date must be recognized before Section 8(f) relief may be granted 104 weeks from that date.

Therefore, the issue of Section 8(f) relief is not ripe for adjudication in this case.

## VII. ORDER

1. The stipulations between the Employer and the Claimant are binding.

2. The compensation rate is $901.28 per week, payable from March 1, 2001, and continuing, for temporary total disability.

3. Employer shall receive credit for all compensation that has been paid.

4. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

5. All computations are subject to verification by the District Director.

6. Pursuant to Section 7 of the Act, the Employer shall provide payment for all past, present and future medical bills incurred for treatment of Claimant's back impairments, including the pain and numbness he has experienced in his left leg.

7. The Claimant's attorney shall within 20 days of the receipt of this order, submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.

8. The issue of entitlement to Section 8(f) relief is for further consideration at the Director level.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/vlj
Newport News, Virginia